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IN THE COURT OF APPEAL OF THE STATE OF  
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

GERMAN RENE  
MARADIAGA,

Defendant and Appellant.

B271506

(Los Angeles County  
Super. Ct. No.  
BA195779)

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed.

Law Office of Eduardo Paredes and Eduardo A. Paredes for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Theresa A. Patterson, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant and appellant German Rene Maradiaga entered a plea of guilty in 2000 to possession of cocaine base for the purpose of sale, in violation of Health and Safety Code section 11351.5. In 2016 defendant filed a motion to vacate and set aside his conviction, arguing he had not been fully advised of the immigration consequences of his plea, as required by Penal Code section 1016.5.<sup>1</sup> Defendant appeals from the denial of the motion to vacate. We affirm.

### ***Defendant's Guilty Plea***

Defendant appeared in court on February 22, 2000, represented by private counsel and assisted by a Spanish language interpreter. The prosecutor advised the trial court that defendant would plead guilty, with an agreed disposition that defendant be placed on probation for three years, conditioned on service of six months in county jail. Defense counsel stated he explained the case disposition to defendant. Defendant told the court he understood the agreement. The court verified that no other promises had been made to defendant and he had not been threatened in

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise indicated.

any way to force him to enter the plea against his will. The court carefully explained the potential maximum period of confinement on the charge, the consequences of a probation or parole violation, and required fines and fees.

Defendant was advised on the immigration consequences of the plea by the trial court. The court explained, “If you are not a citizen of this country, this conviction could lead to your deportation, denial of naturalization, denial of a legal right to re-enter the United States or denial of amnesty.”

After completion of advisement of the consequences of the plea, the court advised defendant of his constitutional rights. Defendant indicated he understood and waived the rights. Defendant told the court he possessed cocaine base that he planned to sell, and entered a plea of guilty.

### ***The Motion to Vacate and Set Aside the Conviction***

Defendant’s written motion, filed February 24, 2016, argued that the trial court’s description of the immigration consequences of the guilty plea did not comport with section 1016.5, subdivision (a). According to the motion, “Specifically, the trial court judge failed to state that [defendant’s] conviction will lead to ‘exclusion from admission to the United States.’” Defendant asserted that the admonition fell short of the statutory requirement that “conviction will lead to denial of admission to the United States because the trial court [advisement] implied that if

[defendant] were to depart the country, then his re-entry would be denied. In contrast, the [advisement seems] to imply that if [defendant] did not depart the United States, then his re-entry may not be denied.” Defendant reasoned that “admission” has a technical meaning in immigration law, relating to “an alien’s ability to seek lawful admission to the United States in either . . . an immigrant or non-immigrant status.”

The motion was supported by defendant’s declaration. Defendant declared he was born in Honduras and came to the United States in 1994 “without permission.” He was arrested in 1999 and retained counsel to help him on his case. On February 22, 2000, defendant went to court expecting to “fight the charges . . . because the drugs or money were not mine.” His attorney told him to plead guilty “because he said that it was the best outcome in my case.” When the judge took his plea, “I could not understand what was stated because the hearing was in English.” Defendant was deported to Honduras after serving time in jail.<sup>2</sup> Defendant did not understand what the judge said in taking his plea: “I know that the judge did not tell me that I would definitely get deported from the United States,” and, “If I knew the rights that I was waiving at the time of my plea, I would not have pled guilty.”

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<sup>2</sup> The record does not reflect when defendant returned to the United States. He appeared in court with counsel at the hearing on his motion.

### ***Ruling of the Trial Court***

The trial court denied the motion on two grounds. First, the court concluded there was substantial compliance with section 1016.5, finding no significant difference in the court's use of "could" instead of the "may," as used in the statute. Second, the court ruled that defendant made no showing in his written motion of prejudice, such as any reason to believe defendant might have obtained a different disposition, exoneration of the charge, or a plea to a different charge.

## **DISCUSSION**

### ***Standard of Review***

"An order denying a section 1016.5 motion will withstand appellate review unless the record shows a clear abuse of discretion. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192 [(*Zamudio*)], citing *People v. Shaw* (1998) 64 Cal.App.4th 492, 495–496; see also § 1016.5, subd. (c).) An exercise of a court's discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice constitutes an abuse of discretion. (*Shaw, supra*, at p. 496.)" (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1517–18.) "We are not free to disregard [an] implied finding that is supported by substantial evidence. (See *Zamudio, supra*, 23 Cal.4th at

p. 210 [factual issues presented on a motion to vacate plea are to be resolved by trial court].)” (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 176 (*Gutierrez*).)

### ***Section 1016.5***

A trial court ruling on a motion under section 1016.5 engages in a three-part analysis. The trial court determines whether (1) “it formerly had failed to advise defendant as section 1016.5 requires,” (2) as a result of the conviction the “defendant actually faces one or more of the statutorily specified immigration consequences,” and (3) the defendant was prejudiced by the court’s having provided incomplete advisements. (*Zamudio, supra*, 23 Cal.4th at pp. 199–200.)

“Penal Code section 1016.5 requires that before accepting a plea of guilty or nolo contendere to any criminal offense, the trial court must advise the defendant that if he or she is not a United States citizen, conviction of the offense may result in deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. (Pen. Code, § 1016.5, subd. (a).) [Fn. omitted.] If the advisement was not given, and the defendant shows that conviction of the offense to which he or she pleaded guilty or nolo contendere may result in adverse immigration consequences, the court, on the defendant’s motion, is required to vacate the judgment and permit the defendant to withdraw his or her plea and enter a plea of not guilty. (*Id.*, subd. (b).) Relief will be granted, however, only

if the defendant establishes prejudice. ([*Zamudio, supra*,] 23 Cal.4th [at p.] 210.) As we explained in *Zamudio*, prejudice is shown if the defendant establishes it was reasonably probable he or she would not have pleaded guilty if properly advised. (*Ibid.*)” (*People v. Martinez* (2013) 57 Cal.4th 555, 558–559 (*Martinez*).) “[B]ecause the question is *what the defendant would have done*, relief should be granted if the court, after considering evidence offered by the parties relevant to that question, determines the defendant would have chosen not to plead guilty or nolo contendere, even if the court also finds it not reasonably probable the defendant would thereby have obtained a more favorable outcome.” (*Id.* at p. 559.)

### ***Analysis***

Defendant has not established error in the trial court rulings that there was substantial compliance with section 1016.5 and that defendant failed to establish prejudice. Section 1016.5 requires the court to advise a defendant that the plea “may result in . . . exclusion from admission to the United States.” Instead of using the “may result” statutory language, the trial court here advised defendant that his plea “could lead to . . . denial of a legal right to re-enter the United States.” In this context, the words “may result” and “could lead” have no significant difference in meaning. “May” is the past tense of might, and is “used to indicate possibility or probability.” (Merriam-Webster Online Dict.

(2016) <<http://www.merriam-webster.com/dictionary/may>> [as of Oct. 25, 2016]; accord, Cambridge Dicts. Online (2016) <<http://dictionary.cambridge.org/dictionary/english/may>> [as of Oct. 25, 2016] [“may is used to express possibility”].) Could is used “to express possibility, [especially] slight or uncertain possibility.” (Cambridge Dicts. Online, *supra*, <<http://dictionary.cambridge.org/dictionary/english/could>> [as of Oct. 25, 2016]; accord, Oxford Dict. (2016) <<https://en.oxforddictionaries.com/definition/could>> [as of Oct. 26, 2016] [could is the past tense of can and is “[u]sed to indicate possibility”].)

Defendant is factually correct that the oral advisement of immigration consequences did not precisely mirror the language of section 1016.5, but “his legal point is not.” (*Gutierrez, supra*, 106 Cal.App.4th at p. 173.) In *Gutierrez*, “instead of using the statutory language ‘exclusion from admission to the United States,’ the prosecutor used the phrase ‘denied re-entry.’” (*Ibid.*) In finding substantial compliance with section 1016.5, the *Gutierrez* court held, “Appellant was expressly told that one of the immigration consequences of his conviction was that he would be denied reentry into the United States; in other words, under the statute, he would be excluded from the United States; . . . . The trial court, thus, substantially complied with the statute, and, hence, committed no error in the manner in which it took appellant’s plea.” (*Id.* at p. 174.)

Here, defendant was told his plea “could lead to . . . denial of a legal right to re-enter the United States.” As



explained in *Gutierrez, supra*, 106 Cal.App.4th at page 174, the court's phrase was the equivalent of advising defendant that his plea may result in exclusion from admission to the United States. The court substantially complied with section 1016.5.

In any event, the trial court's alternative ruling that defendant failed to establish prejudice was not an abuse of discretion. The trial court was free to reject the credibility of defendant's uncorroborated claim that he would not have entered the plea had he known its immigration consequences. "It is up to the trial court to determine whether the defendant's assertion is credible, and the court may reject an assertion that is not supported by an explanation or other corroborating circumstances." (*Martinez, supra*, 57 Cal.4th at p. 565.)

Not only is defendant's declaration lacking in corroboration, it undercuts his claim that he would have gone to trial despite the risks because defendant admits his retained counsel said pleading guilty "was the best outcome in my case," a point defendant does not refute. Finally, we point out that defendant's declaration focused on the consequence of deportation—he states he would not have pled guilty had he known he "would definitely get deported from the United States"—but he does not make a similar assertion regarding exclusion from admission or denial of reentry into the country. Under these circumstances, we cannot say the trial court abused its discretion in finding

that defendant failed to establish prejudice as defined in our Supreme Court's jurisprudence.

### **DISPOSITION**

The order denying the motion to vacate and set aside the conviction is affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

KUMAR, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.